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No. 973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

EDWARD R. GAYLES,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHARLES B. EVINS, ESQ.,
12 W. Garfield Blvd., Suite 200
Chicago 9, Illinois
Attorney for Petitioner

R. EUGENE PINCHAM
12 W. Garfield Blvd., Suite 200
Chicago 9, Illinois,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No.

EDWARD R. GAYLES,

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vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

The petitioner, Edward R. Gayles, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division was entered on May 22, 1962, and is not reported, but appears in the record filed with and certified by the Clerk of the Court of Appeals and transmitted herewith.

The Opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, is reported in 327 Fed. (2d) 715 and is set forth in the appendix hereto.

JURISDICTIONAL STATEMENT.

The Opinion of the United States Court of Appeals was filed February 12, 1964 and the Petition for Rehearing was denied March 9, 1964. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254 (1), 62 Stat. 928.

QUESTIONS PRESENTED.

I.

Should not this Court, for the first time, decide the legal propriety of an instruction that a jury may consider a witness' use of narcotic drugs in determining such witness' credibility, in furtherance of this Court's holding in *Robinson* v. *California,* 370 U.S. 660, 8 L. Ed. (2) 758?

II.

Where, petitioner, an attorney, is charged with a conspiracy to traffic in narcotics and the only persons who testified against him were users of narcotic drugs, whose testimony was emphatically denied by petitioner, did not the trial court err and deny petitioner "Due Process of Law" when it refused to instruct the jury, as proffered by petitioner, that the jury may consider the use of narcotic drugs in determining the credibility of a witness?

III.

Can acts by alleged co-conspirators to avoid and defeat prosecution and punishment for the commission of the conspiracy, or to avoid and defeat prosecution and punishment for the commission of acts unconnected with the conspiracy, be construed as acts committed in furtherance of the conspiracy?

IV.

Did the trial court's effort to "Balance" Petitioner's instruction on the rights and duties of an attorney to his client, which the trial court erroneously felt was "misleading" and "directed a verdict of not guilty," with the trial court's instruction that "an attorney has no special status or license to commit a crime," direct the jury to find petitioner guilty?

STATUTES INVOLVED.

Section 174, Title 21 United States Code, set forth in the appendix.

STATEMENT OF CASE.

Petitioner, Edward R. Gayles, Arthur Faulkner, Jr., Willard Jones, Gladys Davis, Percy Johnson, Floyd Williams, Dennis Green and Nathaniel Spurlark, were charged as defendants in a one count indictment with having, from on or about January 1, 1952 to and including the date of the return of the indictment, September 2, 1959, conspired with each other and with other named co-conspirators, not defendants, to knowingly import into the United States narcotic drugs contrary to law, and to buy and sell such narcotic drugs, knowing the same to have been imported into the United States contrary to law, in violation of Title 21, United States Code, Section 174.

After the trial of the said defendants and petitioner had commenced, but before the Government rested its case, the defendants, Percy Johnson and Floyd Williams, were severed from the trial. Each of the remaining defendants[1] and petitioner were found guilty by the jury. Petitioner was sentenced to imprisonment for five years.

[1] Each of the defendants have filed their respective petitions for Writ of Certiorari.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

At the time of the trial; February 20 to March 8th, 1962, petitioner was an attorney at law and has been engaged in the private practice since December, 1952, (A. 317). After receiving his law degree in 1950, in December of that year, he became an enforcement agent of the Bureau of Narcotics of the United States Treasury Department, assigned to the Chicago office, in which service he remained until his resignation in December, 1952, (A. 316).[1] It was upon his resignation from the Treasury Department that he entered the private practice of law, (A. 317).

Of the twenty-two Government witnesses, only five mentioned petitioner in their testimony. Moses Winston Mardis, one of the five, was a professional bondsman, (A. 217). As to petitioner, he merely testified that at petitioner's request he obtained the release of the co-defendants, Percy Johnson and Floyd Williams, on bond and brought them to petitioner's office, (A. 224). Each of the other four Government witnesses, who mentioned petitioner in their testimony, used narcotic drugs. None of these four attributed the commission of any conspiratorial act to petitioner. Petitioner had represented each of these four Government witnesses in various cases in which they were charged with sundry violations.

Noble R. Thigpen, the first Government witness, an alleged co-conspirator, but not a defendant, was the first of these four witnesses to mention petitioner. At the time Thigpen testified there were two indictments, charging him with the unlawful sale of narcotic drugs to Federal

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[1] (A. 316), refers to the printed Appendix, (The Record on Appeal), filed in the Court of Appeals.

Narcotic agent Bailey, pending against him in the Criminal Court of Cook County, Illinois, (A. 64-65). He was aided in these sales of narcotics to agent Bailey by his 15 year old son, (A. 86). He did not expect to be prosecuted for these violations, which he admittedly committed, because of his testimony in the case at bar, (A. 64, 67). Thigpen used narcotics from 1949 up until December, 1961, (A. 53, 71). In March, 1958, he went to Lexington, Kentucky for narcotic addiction treatment, (A. 61), and stayed there only twelve days. Although not cured of his addiction, he signed himself out of the hospital, (A. 66), and returned to Chicago, (A. 61). He also returned to the use of narcotics, and used drugs once or twice a week until November, 1961, when he again went to Lexington for narcotic addiction treatment. On this occasion he remained there for two weeks and again signed himself out of the institution, though not cured of his addiction, (A. 63, 75). He testified that he last used narcotics about three months before he testified on the trial. At Thigpen's request petitioner represented him in a narcotics case in April, 1953, for which he paid petitioner $150, (A. 61).[1]

Willard S. Evans, an alleged co-conspirator but not a defendant, commenced using narcotics in 1950 and used heroin twice daily, if he had the money, from that time until August of 1961 (A. 246). He too had an indictment pending against him in the Criminal Court of Cook County for the unlawful possession of narcotic drugs, in which case he had not acquired or retained an attorney to represent him, (A. 248). In August 1959, when he testified

[1] The Court sustained objections to and the jury was instructed to disregard Thigpen's testimony that petitioner told him for a sum he would see to it that the police would not bother him again. This testimony could not be properly considered by the jury and petitioner, therefore, presented no rebuttal evidence thereto.

before the Grand Jury that returned the instant indictment on September 2, 1959, he had used heroin and had used it on two occasions on the previous day, (A. 271). Subsequent to his grand jury appearance, he burglarized a grocery store, for which the charge of burglary was pending against him when he testified on the trial of the cause on March 6, 1962, (A. 268). Evans had never received any hospital treatment for a cure for his narcotic addiction, (A. 247). He had been confined in the County Jail for thirty-five days as punishment for the commission of an offense which does not appear of record, and he had taken a shot about three or four times since he had been out of jail, (A. 269). He also smoked marijuana and had done so a couple of weeks prior to his appearance as a witness in the trial, (A. 269). At 7:30 on the morning he testified, he had taken a cough medicine called Tussar, which contained codeine, (A. 269, 275). This cough medicine required the purchaser to sign his name with the druggist, but Evans did not do so when he made his last purchase of it, (A. 279).

Evans testified that prior to February, 1956, petitioner had represented him, (A. 248). His testimony that petitioner called him in February, 1956 and told him to leave from around the Set-Up Lounge because the police were looking for him, (A. 248), was denied by petitioner, (A. 323-325). It was uncontroverted, however, that Evans requested petitioner to ascertain why the police were looking for him and that petitioner performed this service for him and told him that a warrant had been issued for his arrest for assault with intent to kill, (A. 234). Evans admitted that he had assaulted a state witness and that he didn't want to get arrested or go to court. He declined petitioner's advice to surrender to the authorities, telling petitioner that he was going to Winnetka.

Evans further testified that in August, 1957, he was arrested in his home, at which time some other people were arrested at another address. He was charged with loitering in violation of a Chicago Ordinance. Having been arrested in his home, he knew he was not guilty of loitering, (A. 250). The maximum penalty for a violation of the ordinance was a $200.00 fine, (A. 365). Evans retained petitioner to represent him in this case and paid him a fee of $200.00, (A. 250). He testified that petitioner later requested $500.00 more to "fix the case." Not having the $500.00, Evans testified he called defendant Green to obtain for it; that petitioner talked on the telephone, after which he and petitioner entered the courtroom and he was discharged on the case, (A. 251). He did not give petitioner the requested $500.00.

Petitioner denied that he made this request of Evans and was corroborated in his denial by Attorney Maurice Scott, who, from a review of his diary, testified that it was he who represented Evans in this case and that petitioner represented another defendant, who had been arrested at the time of Evans' arrest, (A. 365-368).

Government witnesses, Woodrow Wilson, another alleged co-conspirator who was not indicted as a defendant, and his wife, Elaine Wilson, both testified that they used marijuana, (A. 104, 131). Wilson was indicted in the Federal Court in St. Louis, Mo. for a narcotic violation. Petitioner represented him in the case, having been hired so to do by Mrs. Wilson. He pleaded guilty and was sentenced to five years in prison, (A. 149).

Wilson did not testify that petitioner was present during a conversation in the latter's home in which Wilson, Spurlark, Police Lt. George Sims and Police Sgt. James Bryson, arranged for Wilson to purchase narcotics from

Big John. For all that appears in this entire record, there is absolutely no evidence that petitioner even had knowledge that such a conversation ever occurred, (A. 92; Tr. 438-439).[1] Petitioner and Lt. Sims denied this conversation, (A. 319-320).

Wilson testified that he had been dealing in and selling narcotics since 1952, (A. 89). When he was arrested in his home in December, 1954, no narcotics were found; nor was he charged with a narcotics violation, (A. 115). He hired petitioner to represent him in the case and the case was dismissed, after which he went by petitioner's office in the Drexel Bank Building on the southeast corner of Oakwood Blvd. and Cottage Grove Avenue, (A. 114), and asked petitioner what was going to happen to his case, (A. 96). From his experience he knew the precautionary measures to take in dealing in narcotics, (A. 114). But petitioner, he testified, told him to be careful in handling packages, wear gloves and be careful of the telephone and tape recordings, (A. 96).

This too was denied by petitioner, (A. 320), who was corroborated in his denial by Attorney Stanley Cooke, (A. 368-369). Petitioner and Attorney Cooke testified that in December 1954, they and other attorneys were junior associates of Attorney Joseph E. Clayton, and that their office was not located in the Drexel Bank Building, Oakwood and Cottage Grove, but rather was at 3518 South State Street. The Sullivan Law Directory, as well as the Illinois Telephone Directory, further corroborated petitioner and Attorney Cooke and indisputably contradicted Wilson, (A. 370-371).

It was on cross examination of petitioner that the Government brought out that petitioner, petitioner's law part-

[1] (Tr. 438-439) refers to the trial transcript.

ner Eddie Johnson, Percy Sims Jr. a mortician, and the co-defendant Dennis Green were managers of The Mortician's Underwriters Association, in which petitioner, petitioner's father, the co-defendants Nathaniel Spurlark and Arthur Faulkner and Otis Sears were investors, (A. 338). The Government presented no evidence to show or suggest that this business venture was anything other than a bona fide and legitimate one.

It was also on cross examination of petitioner and his witness Lt. George Sims, that the Government repeatedly brought out before the jury that petitioner, George Sims and James Bryson had gone on various and sundry vacation trips with ladies, who were not their wives, (A. 339-341, 362). The Government did not even suggest, by evidence or otherwise, that these clandestine ventures had any possible connection with the offense for which petitioner was on trial.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

THIS COURT HAS NEVER PASSED UPON THE LEGAL PROPRIETY OF AN INSTRUCTION THAT THE JURY MAY CONSIDER A WITNESS' USE OF NARCOTIC DRUGS IN DETERMINING SUCH WITNESS' CREDIBILITY.

From the foregoing facts it is quite obvious that the Government's evidence did no more than smear petitioner, an attorney at law and former narcotic agent. It fell far short of establishing petitioner's membership or participation in a conspiracy to traffic in narcotics. The trial court recognized the deficiency of the Government's proof to establish the guilt of petitioner beyond a reasonable doubt. In overruling petitioner's post-trial motion for judgment of acquittal the trial court stated:

> *"* * * I must confess, Mr. Pincham, that I struggled most extensively with the Gayles' case, and, frankly, my clerk and I both have had long discussion about the reasonableness of the jury's verdict particularly with respect to defendant Gayles."*

Whether the Government's evidence was or was not sufficient to sustain the jury's finding, it was highly contested and controverted by petitioner. Each and every act of transgression attributed to him was denied by him, except his violation of his marital vows, for which he certainly was not on trial. The other transgressions were attributed to him by chronic users of narcotic drugs. The jury, therefore, should have been fully and properly instructed on every phase of the case. It was not so instructed. The

court gave not a single solitary instruction that the jury may consider the use of narcotic drugs in determining the credibility of a witness. Because the jury was not so instructed, petitioner was insatiably prejudiced. Had it been so instructed the scale might very well have tilted in favor of petitioner.

The Court refused Gayle's tendered instruction which read, (A. 442):

> "You are instructed that in determining the credibility of a witness, you may consider his use of narcotic drugs or any impairment of testimonial powers arising from any source. The capacity of a witness to observe and receive accurate impressions, to retain them in his memory and to correctly relate them; also his power and inclination to be truthful are all subjects that go toward the credibility of a witness."

In tendering this instruction, petitioner relied on the authority of *Fletcher* v. *United States*, 158 Fed. (2) 321 and Wigmore on Evidence, 3rd. Ed., 1940, Section 934. It is utterly astounding, to say the least, that this Court has not heretofore been called upon to pass upon the legal priority of an instruction that a jury may consider a witness' use of narcotic drugs in determining his credibility. This Court's decision, however, in *Robinson* v. *California*, 370 U.S. 660, 8 L. Ed. 2nd 758, decided only three months after the conclusion of the instant trial, is more than adequate authority for the giving of such an instruction. In fact, it is respectfully suggested, *ROBINSON* compels the giving of such an instruction. It is true that *ROBINSON* dealt with the constitutionality, under the 8th and 14th Amendments to the Constitution of the United States, of a California statute which made it a criminal offense to be addicted to the use of narcotics. But This Court's astute and scholarly recognition of narcotic addiction as an ill-

ness in *ROBINSON*, well supported and documented by the experts and authorities cited therein, permits no other conclusion than that the use of narcotic drugs by a witness is a proper consideration for the jury in determining such witness' credibility. This Court's opinion in *ROBINSON* certainly cannot be improved upon by this writer and needs no further amplification in this petition.

In reliance upon *ROBINSON*, the Supreme Court of Illinois, in *People* v. *Davis*, 188 N.E. (2) 225, held the Illinois Statute, which did not make it a criminal offense to be addicted to the use of narcotics as did the California Statute, but, rather, which prohibited the "unlawful use of narcotic drugs or to be under the influence of or be addicted to the *unlawful* use of narcotic drugs," was violative of the Fourteenth Amendment to the Constitution of the United States.

The Illinois Supreme Court is in further accord with the views expressed by this Court, in *ROBINSON*, that narcotic addition is an illness. But that Court, unlike this Court, has on several occasions been called upon to express the view that the use of narcotic drugs is a proper consideration for the jury in determining a witnesses' credibility. *People* v. *Hamby*, 6 Ill. (2) 559, 129 N.E. (2) 746, page 748; *People* v. *Boyd*, 17 Ill. (2) 324, 161 N.E. (2) 311, page 314; *People* v. *Crump*, 5 Ill. (2) 251, 125 N.E. (2) 615, page 621; *People* v. *Bazemore*, 25 Ill. (2) 74, 182 N.E. (2) 649, pages 650-651. The Illinois Supreme Court is not alone in this view: *Leland* v. *State*, 86 Tex. Cr. R. 285, 217 S.W. 147; *State* v. *Loon*, 29 Idaho 248, 158 P. 233; *Anderson* v. *State*, 65 Tex. Cr. R. 365, 144 S.W. 281; *People* v. *Webster*, 139 N.Y. 73, 34 N.E. 730; *Chicago and Northwestern Railway Company* v. *McKenna*, 74 Fed. (2) 155.

State v. *Concannon*, 25 Wash. 327, 65 P. 534 and 3 Wigmore, Evidence, 3rd Edition, 1940, Section 934.

The Court of Appeals in the case at bar, adroitly avoided stating or holding that petitioner's proffered instruction, that the jury may consider a witness' use of narcotic drugs in determining such witness' credibility, was erroneous, did not correctly state the law, or that there was no evidentiary support in the record for the giving of the instruction. For that matter, the Court of Appeals did not state or hold that the trial court should or should not have given Gayles' proffered instruction. The Court of Appeals merely held that, 327 Fed. (2) 715, page 718, "* * * *In different words the substance of Gayles' instruction was covered.*" This is a gross misstatement. The jury was not in any way instructed on the use of narcotic drugs as effecting a witness' credibility.

What the Court of Appeals has held is that, inasmuch as the jury was instructed on every other phase of credibility; *i.e.*, the jury's function of weighing testimony, the circumstances of a witness' testimony, his relation to the Government, promises or hope of reward, etc., the jury need not, therefore, have been additionally instructed that it may also consider the use of narcotic drugs in determining credibility.

But even this holding was not entirely satisfactory to the Court of Appeals. For the Court thereafter proceeded to endeavor to distinguish the holding in *Fletcher* v. *United States*, 158 Fed. (2) 321, and *People* v. *Bazemore*, 25 Ill. (2) 74, 182 N.E. (2) 649, on the nebulous position that in these cases the witness, who was addicted to the drugs, was uncorroborated in his testimony. Therefore, so holds the Court of Appeals, these two authorities are not applicable to the case at bar. The Court of Appeals therefore

holds that the use of narcotic drugs is a proper consideration in determining the credibility of a witness where such witness has not been corroborated, but that the use of narcotic drugs is not a proper consideration in determining credibility where such witness has been corroborated. The total absence of logic in this holding compels its rejection.

After pointing out that the testimony of the narcotic addict witnesses in *FLETCHER* and *BAZEMORE* was uncorroborated, The Court of Appeals then refused to rely upon or apply the court's own pronounced distinction to petitioner. The testimony of the narcotic users in the case at bar, as to petitioner, was wholly without any corroboration. By the Court of Appeals on distinguishing standard, *BAZEMORE* and *FLETCHER* were applicable to petitioner.

The Court of Appeals further recognized the tenousness of Its holding, for The Court immediately endeavored to further justify Its rejection of *FLETCHER* and *BAZEMORE* on the ground that, 327 Fed. (2) 715, page 719: "*The inference here could be that Evans was not an addict,* * * *.*" The inference could also be that he was an addict. Presumably, the Court is referring to Evans' addiction at the time he testified. There was no question that immediately prior to his testimony he was an addict. Moreover, Noble Thigpen candidly admitted his addiction to narcotic drugs at the time he testified.

In whatever manner the opinion of the Court of Appeals in the case at bar is to be evaluated, except from the inference derived by the court's affirmance of the convictions, the Court did not decide the legal propriety of Gayles' proffered instruction. The trial court erred in refusing to give it.

This Court recognized in *ROBINSON*, 330 U.S. 660, 8 L.Ed. (2) 758, P. 767, 768, (concurring opinion of Mr. Justice Douglas), that *"the addict is a sick person"* and *"has a disease and * * * must be treated as a sick person."* A fortiorari, petitioner was entitled to have had the jury instructed that it may consider this illness in determining the witness' credibility.

II.

ACTS BY ALLEGED CO-CONSPIRATORS TO AVOID AND DEFEAT PROSECUTION AND PUNISHMENT FOR THE COMMISSION OF THE CONSPIRACY, OR TO AVOID AND DEFEAT PROSECUTION AND PUNISHMENT FOR THE COMMISSION OF ACTS UNCONNECTED WITH THE CONSPIRACY, CANNOT BE CONSTRUED AND ARE INADMISSIBLE AS ACTS COMMITTED IN FURTHERANCE OF THE CONSPIRACY.

Even if the Government's evidence be true that petitioner called Evans at the Set-Up Lounge and advised him to leave to avoid apprehension by the police, and even if the Government's evidence be true that petitioner requested $500.00 from Evans to fix a disorderly conduct case pending against him, such evidence was not admissible on this trial for a conspiracy to traffic in narcotic drugs. These acts, at best, can be construed as no more than an effort on the part of co-conspirators to avoid prosecution and defeat punishment for the commission of acts totally and wholly unconnected with the alleged conspiracy. This Court held in *Krulewitch* v. *United States*, 336 U.S. 440, pages 443, 456-457; *Lutwak* v. *United States*, 344 U.S. 604, 97 L.Ed. 593 and *Gruenwald* v. *United States*, 353 U.S. 391; 1 L.Ed. (2) 931, pages 940-942, 943, 944, that efforts by alleged co-conspirators to avoid and defeat prosecution for the commission of the conspiracy or acts committed pursuant thereto or in

furtherance thereof cannot be construed as an act committed in furtherance of the conspiracy. The acts for which petitioner and Evans were endeavoring to avoid and defeat prosecution, if Evans' testimony is to be believed, were not even acts committed in furtherance of or pursuant to the alleged conspiracy. Evans had assaulted a witness and had been arrested for loitering—acts wholly unconnected with and unrelated to the alleged conspiracy to traffic in narcotics.

The Government in the trial court endeavored to justify the admission of this evidence on the ground that these acts were committed by petitioner "To insure the continued ability of a co-conspirator (Evans) to remain active in the conspiracy", (A.A. 30). Such was the position taken by the Government in its Memorandum in opposition to petitioner's post trial motion for judgment of acquittal.

It is unquestioned that co-conspirators need not know all the persons engaged in a conspiracy in order to be a member thereof. But in order for a transaction between two alleged co-conspirators to possibly be construed as an act by one to further the others "Continued ability to remain active in the conspiracy," the evidence must also establish that the two alleged co-conspirators knew that the other was a member of the conspiracy. It must then be further shown and established by the evidence that the particular act was knowingly done by them with an informed community of design and intent between them. There was absolutely no evidence that petitioner knew or even should have known that Evans was a member of the alleged conspiracy. How then can it possibly be said that his advise to Evans to leave the

(A.A. 30) refers to Gayles additional typewritten Appendix filed in the Court of Appeals and submitted herewith.

Set-Up Lounge because police were looking for him or his request for the $500.00 to fix a case, was an effort by petitioner to insure Evans' continued ability to remain active in a conspiracy, of which conspiracy, petitioner had no knowledge and of which petitioner did not know Evans was a member.

III.

THE TRIAL COURT'S EFFORT TO "BALANCE" PETITIONERS' INSTRUCTION ON THE RIGHTS AND DUTIES OF AN ATTORNEY TO HIS CLIENT, WHICH THE TRIAL COURT ERRONEOUSLY FELT WAS "MISLEADING" AND "DIRECTED A VERDICT OF NOT GUILTY", WITH THE TRIAL COURT'S INSTRUCTION THAT AN ATTORNEY HAS NO SPECIAL STATUS OR LICENSE TO COMMIT A CRIME, WAS TO DIRECT THE JURY TO FIND PETITIONER GUILTY.

Petitioner denied and refuted every misdeed attributed to him. He did not endeavor to justify such alleged improper conduct on the ground that he was an attorney. For the trial court, therefore, to instruct the jury that an attorney has no special status which permits him to perform an unlawful act or to join an unlawful conspiracy or assist a client to commit an unlawful act was to instruct the jury to find petitioner guilty. *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, page 408, 410; *Montford* v. *United States*, 271 Fed. (2) 52; *Smith* v. *United States*, 230 Fed. (2) 935. The trial court expressly recognized this. (A. 493). It felt it necessary to so instruct the jury "*in order to balance*" the instruction on an attorney's rights and duties to a client. The trial court stated that petitioner's proffered instruction on the rights and duties of an attorney to his client "*sounded to me like I was telling the jury,*

almost, to direct a verdict in favor of Mr. Gayles", and that "*I have to say to the jury that [being an attorney] doesn't make him a special figure in the case; he doesn't have a license to commit a crime or participate.*" (A. 405). In so doing, the trial court instructed the jury to find petitioner guilty.

CONCLUSION.

We importune this Court to grant Its Writ of Certiorari.

Respectfully submitted.

R. Eugene Pincham and
Charles B. Evins,
Attorneys for Petitioner.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 13849-13853

SEPTEMBER TERM, 1963 JANUARY SESSION, 1964

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 13849 v.

DENNIS GREEN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 13850 v.

GLADYS DAVIS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 13851 v.

ARTHUR FAULKNER, JR.,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff Appellee,

No. 13852 v.

EDWARD R. GAYLES,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 13853 v.

NATHANIAL SPURLARK,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

February 12, 1964

Before HASTINGS, *Chief Judge*, KNOCH and KILEY, *Circuit Judges*.

KILEY, *Circuit Judge.* Appellants appeal from their conviction, by a jury, after a thirteen day trial on an indictment charging a conspiracy to violate the narcotics law.[1] The five appeals were consolidated in this court.

In deciding the issue whether there was evidence upon which the jury could infer guilt of defendants beyond a reasonable doubt, we must take the testimony and reasonable inferences most favorable to the government. *United States* v. *Glasser*, 315 U. S. 60, 80 (1942), *United States* v. *Miele*, ... F. 2d ..... (7th Cir. Nos. 14145-49, January 8, 1964).

Thigpen,[2] at defendant Spurlark's direction, purchased narcotics from Katy Lewis from 1951 through 1956. After her death in 1956 Spurlark directed Thigpen to purchase from defendant Willard Jones.[3] In 1958 Spurlark directed him to pick up narcotics from defendant Gladys Davis. In 1958 Thigpen twice sold narcotics received from Spurlark to Narcotics Agent Bailey. From 1952 to 1955 witness[4] Wilson purchased narcotics from Spurlark and Lewis. He also arranged for his wife to purchase from them. Later Wilson bought narcotics from defendant Green and Green told him "you know Ted [Spurlark] and I are in business together . . . my partner." Witness William Smith purchased narcotics from Spurlark in 1953 and 1954 and thereafter from Katy Lewis until her death. After her death, Smith, at Spurlark's direction, bought narcotics from Jones and then from Gladys Davis. From 1952 to 1954 Evans[5] bought narcotics from Green, and later from Spurlark and Katy Lewis. In 1955 Spurlark told witness Mardis that he was putting Green "in charge of all activity on the west side."

In 1955, in a conversation at which Evans, Green, Spurlark and Mardis were present, Evans was told Green was

[1] A conspiracy in violation of 21 U. S. C. § 174.

[2] An unindicted co-conspirator.

[3] Appellant in No. 13854, not consolidated with these causes.

[4] "Witness," as used in this opinion, designates those who are neither defendants nor unindicted co-conspirators and who testified at the trial.

[5] An unindicted co-conspirator.

to take over the sale of narcotics on the west side. Late in 1955, with Green's permission, Evans and defendant Faulkner "combined" their business for the sale of narcotics on the west side for a few months. In June of 1956 Faulkner and Spurlark brought narcotics back from New York to relieve a "shortage" in Chicago. Evans purchased narcotics from Green from 1955 to 1959 except for a two month period when, in Green's absence, he bought from Faulkner.

Witness Rouzer of Detroit made several purchases from Spurlark in 1955. In 1958, at Spurlark's direction, Rouzer twice went to Gladys Davis' apartment to await narcotics deliveries. And twice Spurlark sent Gladys Davis to Detroit to get money from Rouzer for Spurlark.

It is needless to detail more of the testimony which amply justified the jury in the inference that at the center of this narcotics web was Spurlark, holding it together, and operating from the Rodeo Lounge on Chicago's south side, through Dennis Green, Evans and Faulkner on the west side, and through the late Katy Lewis, Jones and Gladys Davis on the south side.

The testimony against defendant Gayles, an attorney, did not link in any way with the sale or distribution of the narcotics. There is testimony favorable to the prosecution, however, and the inferences the jury could reasonably draw, to show that he was more than an attorney for the defendants; and that he knowingly participated intentionally, *Direct Sales Co.* v. *United States*, 319 U. S. 703, 711 (1943), in aiding his co-defendants, and others, from late 1954 to 1959, in carrying out their illegal enterprise: "After 1953" he was a manager, along with defendant Green, in the Morticians Underwriters Association, in which Spurlark and Faulkner had made investments. Gayles was present at the meeting and conversations in his home attended by Spurlark, Wilson, and police officers who were planning the arrest of "Big John," a competitor of Spurlark's whom the latter said "some people" wanted to "bust." Gayles told Thigpen, an addict and peddler

whom he represented, that for $125 per month he could see that the police did not bother Thigpen again. Gayles told Wilson to be careful about telephones and tape recorders, and to use gloves when handling packages because the police "will be trying to get" him. Gayles told Evans and Faulkner to stay away "from around the Setup" tavern because police officers were looking for them. He told Evans that he would need "five hundred" to fix a case, after confirming that Green would vouch for the money.

There is no merit to the contention of defendants that more than one conspiracy was shown, to their prejudice, by the evidence, or that the evidence showed merely a number of unrelated episodes.[6] There is testimony to show that Spurlark, beginning in 1952, was the source from which the narcotics flowed to his south and west side minions; and that Gladys Davis, Evans and Faulkner operated to some extent on both the south and west sides of the distribution structure. The jury could infer from this evidence that each defendant knew, or should have known, of the conspiracy. *United States* v. *Poliafico*, 237 F. 2d 97 (6th Cir. 1956), *cert. denied*, 352 U. S. 1025 (1957). It was not necessary that each co-conspirator knew all others or that each witness mention all, or that each one be involved throughout the entire span of seven years. *United States* v. *Micele*; ..... F. 2d ..... (7th Cir. Nos. 14145-49, January 8, 1964). A fluctuation of the membership during the span of this record of continuous activity cannot be compared to the facts in *United States* v. *Russano*, 257 F. 2d 712 (2d Cir. 1958), where the evidence established two conspiracies, with a break between the two. The rule in *Kotteakos* v. *United States*, 328 U. S. 750 (1946), is not applicable here, because the evidence shows but one conspiracy with Spurlark at the center and several conspirators radiating from him. The trial court properly denied motions for severance on grounds of variance or misjoinder.

[6] For example, the sale by Spurlark to witness Minnett Maljohn, in 1958, who took the purchased goods to Davenport, Iowa, established that the "white powder" Spurlark was selling was heroin hydrochloride.

Since the cases of Johnson and Williams were severed during trial, there is no merit of Gayles' contention of prejudicial joinder. The court, in ruling against Gayles' proffer of testimony of his pre-conspiracy participation in arrests of co-defendants, weighed the probable prejudice to Spurlark and Green against the probable gain to Gayles from the testimony. We see no abuse of discretion in the ruling, and cannot see error in denying him a severance because he could not, otherwise, introduce the testimony.

Gayles proffered an instruction which told the jury that Gayles' representation of co-defendants for narcotics violations was insufficient to prove his participation or membership in the conspiracy. It then went on to state, in the abstract, rights and duties of attorneys[1] in defense of alleged violations of law. The trial court read this instruction as tending to direct a verdict of not guilty, and added the following cautionary paragraph:

> "You are not to infer from the foregoing however, that an attorney has any special status which permits him to perform an unlawful act, or to join an unlawful conspiracy, nor may he knowingly assist a client to commit an unlawful act or to further an unlawful conspiracy."

We cannot say the court misread the proffered instruction, nor that the modification directed a guilty verdict or otherwise prejudiced Gayles, nor that the paragraph was without an evidentiary basis.

Gayles tendered an instruction dealing generally with jury's consideration of the use of narcotics as an element

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[1] "It is the right and duty of a lawyer to undertake the defense of a person accused of a crime, regardless of his personal opinion of the guilt of the accused. Otherwise, innocent persons, victims only of suspicious circumstances may be denied proper defense.

"Having undertaken such defense the lawyer is bound by all fair and honorable means to present every defense that the law of the land permits, to the ends that no person may be deprived of life or liberty, except by due process of the law.

"Under the law an attorney may not reveal or disclose to law enforcement agencies or to anyone, any information revealed to him by his client. And the fact that an attorney does not inform or advise law enforcement agencies of any information revealed to him by a client is not in any way to be taken or construed against said attorney."

in determining credibility, Faulkner offered an instruction naming government witness Evans as a ten-year addict prior to August, 1961, and stating his testimony should be received with "extreme caution and suspicion" and be given serious consideration only when corroborated. The court refused to give these instructions.

The court gave thorough instructions regarding credibility and weight of testimony, beginning:

> "You have heard much discussion of the question of the credibility and weight you are to give to the testimony of the particular witnesses. Let me be as explicit as I can on that."

The instruction went on to inform the jury that they were "sole judges" of credibility; that the presumption that a witness speaks the truth is rebuttable by the manner in which he testifies, the character of his testimony, or contradictory evidence; that in weighing the testimony of each witness they were to give *careful scrutiny* (our emphasis) to the circumstances of his testimony, his demeanor on the stand, his relation to the government or to defendants, the manner in which the verdict might affect him, and the extent to which he is contradicted; and that they could consider promises of immunity or hope of reward in weighing the credibility of the witness, and the effect of any false testimony they might find on other testimony of the witness. The instruction told the jury of its right to examine the evidence "closely and carefully in the light of the common knowledge and experience of mankind * * * and your own" in determining credibility.

The court was clearly correct in rejecting Faulkner's instruction naming witness Evans. And in different words the substance of Gayles' instruction was covered.

Defendants admit that Evans' history as an addict was brought out "with commendable candor" by the government and there is no complaint that cross-examination of him was unduly limited. Defendants' expert witness' opinion was that Evans testified "to the best of what

would be his normal ability," and government's expert's testimony would justify the inference that Evans had "kicked the habit" several months prior to testifying.

Fletcher v. *United States*, 158 F. 2d 321 (D. C. Cir. 1946), is distinguishable because the district court there refused to instruct the jury that the informer's testimony should receive greater scrutiny and care than the ordinary witness. The court of appeals pinned the decision to the "facts of this case" where the testimony of the informer, addict and dope peddler, was uncorroborated and the only testimony against Fletcher. And *People* v. *Bazemore*, 25 Ill. 2d 74, 182 N. E. 2d 649 (1962), is to the same effect. The inference here could be that Evans was not an addict, that his testimony had been corroborated, and that the instruction was sufficiently cautionary. The dictum in *Fletcher* about "the well recognized fact" of an addict being "inherently a perjurer" is not pertinent. Here, under the instruction the jury knew Evans' testimony should be carefully scrutinized. The circumstances here do not fall under the reversible error test laid down by the court in *Phelps* v. *United States*, 252 F. 2d 49, 53 (5th Cir. 1958).

We see no merit in the contention that the district court committed reversible error by refusing to give the instructions tendered by Gayles and Faulkner.

The court's instruction is criticized too for stating that "a witness is presumed to tell the truth * * *" and we are referred to Judge Brown's concurring opinion in *Knapp* v. *United States*, 316 F. 2d 794 (5th Cir. 1963), where the only witnesses were government witnesses. The majority did not reverse; it did not approve the instruction on the facts there. What Judge Brown said, with no idea of reversible error, of the "presumed to tell the truth" statement was said in relation to an accompanying instruction and we think does not relate to the instruction here.

We see no need of discussing other claims of error in the giving, or refusing, of other instructions. We have

considered the claims and find that the court's instructions included in substance all proffered instructions that were proper and that the instructions given were not erroneous.

The rule in *Falcone* v. *United States*, 109 F. 2d 579 (2d Cir. 1940), *affirmed* 311 U. S. 205, does not apply to render reversible error the testimony of Wilson regarding Gayles and Spurlark, and testimony of Mardis as bondsman. Neither does the hearsay rule exception discussed in *Krulewitch* v. *United States*, 336 U. S. 440 (1949), nor the rule in *Greenwood* v. *United States*, 353 U. S. 391, 401-04 (1957), apply to the testimony of Evans against Gayles. These items of evidence in the context of all the evidence, related above, render the rules inapplicable; the jury could conclude the events testified to were in furtherance of the conspiracy, not merely legitimate transactions; and not a "subsidiary conspiracy" of events after the alleged conspiracy ended. And we see no error in the cross-examination of Gayles about the Morticians Association and see no reversible error in the cross-examination about his trips with other men, and women not their wives.

In view of *United States* v. *Garfoli*, 324 F. 2d 909 (7th Cir. 1963), and because of what was sought, we see no abuse of discretion in the trial court's denial of Green's motion for a bill of particulars.

Various other alleged errors, asserted by the different defendants, have been considered, but we find them to be without substance. We find no reversible error as to any of the defendants.

The judgments are AFFIRMED.

Petition for Rehearing denied on March 9, 1964.

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Section 174, Title 21, United States Code

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. . . .
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.